

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY ROBERT HILDEBRANT,

Defendant-Appellant.

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UNPUBLISHED

January 15, 2008

No. 271840

St. Clair Circuit Court

LC No. 05-002902-FH

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of felonious assault, MCL 750.82. Defendant was sentenced as a second habitual offender, MCL 769.10, to a prison term of 15 months to six years. We affirm.

Defendant first asserts a mistrial should have been granted because jurors may have seen him in shackles while being escorted in the courthouse corridor. This court reviews the trial court's denial of a mistrial for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). In order to justify a reversal of the trial court's ruling defendant must demonstrate that observation of him by members of the jury while shackled resulted in prejudice. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988).

Most importantly, defendant is unable to demonstrate that he was actually observed by any juror while shackled. The police officer escorting defendant provided a statement to the trial court but did not indicate that he had seen any jurors in the hallway while transporting defendant to the courtroom area. In addition, defendant did not request an evidentiary hearing to verify or determine whether any jurors had observed him in shackles resulting in prejudice. Without a showing of prejudice, "this Court will not reverse a defendant's criminal conviction merely because the jury may have seen the defendant in handcuffs." *People v Herndon*, 98 Mich App 668, 672; 296 NW2d 333 (1980). Further, any prejudice could have been cured by the provision of a cautionary instruction. However, defendant's counsel did not request any special or curative instruction from the trial court. Absent such a request, the trial court had no "duty to give any [special] cautionary instruction to the jury regarding any encounter they may have had with defendant while he was in [shackles]." *Herndon, supra* at 673. Consequently, the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

Next, defendant mistakenly characterizes several alleged errors pertaining to the admissibility of evidence, discovery violations and the absence of due diligence to produce listed witnesses as matters of prosecutorial misconduct. The first of these assertions concerns the failure of the prosecutor to produce the victim's dental records. Defendant did not raise this issue until his motion for directed verdict at a dispositional hearing subsequent to the rendering of the jury's verdict in this matter. As a result, we review only for plain error in accordance with *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We would note that defendant fails to explain or delineate the basis for his claim of error regarding the prosecutor's failure to provide the victim's dental records. A defendant is precluded from simply announcing his position while leaving "it to this Court to discover and rationalize the basis for his claims." *People v Hermiz*, 235 Mich App 248, 258; 597 NW2d 218 (1999). Although this allegation by defendant may be more properly understood as a claim for violation of discovery, we note that defendant never made a formal discovery request for the disputed records. MCR 6.201. "There is no general constitutional right to discovery in a criminal case," *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), and "discovery in criminal cases is constrained by the limitations expressly set forth in the . . . criminal discovery rules promulgated by our Supreme Court, MCR 6.201." *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 447; 722 NW2d 254 (2006). Further, "due process requires only that the prosecution provide a defendant with material, exculpatory evidence in its possession." *Id.* at 447 n 4. In this instance, there is no evidence that the subject records contained exculpatory evidence or even, on a more basic level, that the prosecutor possessed the records. Further, the victim's dental records do not impact the determination of whether an assault occurred, merely the victim's credibility regarding the description and extent of his injuries. If defendant is asserting that these records were necessary to discredit the victim's testimony, it is noteworthy that the testimony and records of the treating emergency room physician already contradicted the victim's assertion that the assault resulted in the loss of denture. Hence, the submission of the victim's dental records would have provided merely cumulative evidence that the victim did not lose any teeth as a result of the assault.

Defendant also challenges the trial court's decision to permit the prosecutor to introduce into evidence a baseball bat purportedly identified as the weapon used by defendant in assaulting the victim. Again, we note that although defendant contends this was error in his statement of the issue presented, he fails to expound on the basis for his assertion or cite to any relevant case law in support of his theory.

The victim testified and reported to police that defendant hit him with a baseball bat. Shortly before trial a baseball bat was recovered from property near the victim's residence. The victim indicated that the recovered baseball bat was similar to his daughter's, which was missing from his home after the assault. The prosecutor sought a ruling from the trial court regarding the admissibility of the bat. The trial court initially ruled that it would not admit the bat as evidence unless it became an issue at trial whether the baseball bat existed or was used in the assault. However, the trial court cautioned that if the defense challenged the existence of the bat, it would permit introduction of the item into evidence. During defendant's testimony he denied the

existence of a baseball bat in the victim's residence. Accordingly, the trial court permitted the prosecutor to admit the baseball bat into evidence in response to defendant's testimony.

Generally, relevant evidence is admissible. MRE 402. Relevant evidence is defined as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence." MRE 401. In this matter, defendant was charged with felonious assault. The elements of felonious assault include (1) the occurrence of an assault, (2) with a dangerous weapon, and (3) involving the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Accordingly, given defendant's dispute of the existence of the alleged weapon, it became necessary for the prosecutor to admit the weapon into evidence. Proper rebuttal evidence is "responsive to evidence introduced or a theory developed by the defendant." *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Finally, in support of this Court's determination that defendant mischaracterizes this issue as one of prosecutorial misconduct, we note that a claim of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant also mistakenly contends that the prosecutor's failure to secure two witnesses to the assault, Robert Knapp and Paul Ditrapani, constituted prosecutorial misconduct. A prosecutor is required to produce a witness if endorsed by placement or inclusion of the witness on the prosecutor's witness list, or where the prosecutor's assistance is requested by the defendant to locate the witnesses. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003); *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). Here, the prosecutor endorsed both witnesses by including them on its witness list, and thus was under an obligation to exercise due diligence in producing them at trial. MCL 767.40a(3). Defendant requested, but was denied, a "missing witness" instruction by the trial court. A trial court's determination of due diligence in producing a *res gestae* witness will not be overturned on appeal absent an abuse of discretion. The trial court's determination constitutes a factual matter, which will not be reversed unless clearly erroneous. *People v Lawton*, 196 Mich App 341, 348; 482 NW2d 810 (1992).

A prosecutor's efforts to secure a witness must be reasonable based on "the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The officer in this case took action to track down the two missing witnesses. In attempting to locate Knapp, the officer left a message with the complainant and verified that Knapp had an outstanding arrest warrant. The officer issued several subpoenas to individuals by this name, but the individuals that responded were not the correct person. Allegedly, the officer was informed that Knapp had been subsequently observed at the victim's residence, but did not go out to the residence in an attempt to locate him. With regard to attempts to locate Ditrapani, the officer made several trips to a farmhouse where this individual was thought to have resided and phoned the telephone number listed for that address. The officer indicated that he verified that unrelated arrest warrants existed for Ditrapani, but that he had been told that this individual had moved out of state.

Given the absence of a due diligence hearing in this matter, it is not possible for this Court to determine, with any certainty, all the steps or efforts that were taken to produce these individuals for trial. However, there is no basis in the lower court record, to conclude that the prosecutor and police made anything less than a good faith effort to produce these witnesses. Defendant has not provided any evidence that the prosecutor failed to contact individuals regarding the whereabouts of these witnesses or that these witnesses would have willingly provided assistance if requested. In addition, given the fact that both witnesses had outstanding arrest warrants pending it is unlikely that the witnesses would cooperate with law enforcement in revealing their location. This is particularly true of Ditrapani given defendant's implication of this individual as a participant in the incidents and having committed on assault on Knapp. Based on Ditrapani's status as a potential accomplice, the prosecutor was not under an obligation to call this individual as a *res gestae* witness. *Lawton, supra* at 346.

Further, aside from the prosecutor's demonstration of due diligence in locating these witnesses, evidence in the lower court record does not demonstrate that defendant suffered any actual prejudice by their failure to testify. A "new trial is not automatically warranted simply because the prosecution has failed to exercise due diligence in the production of a missing *res gestae* witness. The key issue in determining the proper remedy for the defendant . . . is whether the defendant is prejudiced." *People v Pearson*, 404 Mich 698, 724; 273 NW2d 856 (1979), superseded in part on other grounds MCL 767.40a. Given the potential for self-implication by Ditrapani, it is impossible for this Court to know the content of his potential testimony at trial. In addition, the trial court did not preclude defendant from arguing that testimony by these witnesses would have either corroborated or been favorable to defendant. In effect, defendant's argument on appeal does not set forth the content of the potential testimony by these witnesses but merely speculates that their testimony would have served to make defendant's testimony more credible.

Defendant next asserts there was insufficient evidence to support his conviction because the prosecutor did not meet the burden of proof necessary based on defendant's assertion of self-defense. This Court reviews *de novo* a challenge to the sufficiency of the evidence. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "In reviewing a challenge to the sufficiency of the evidence, this Court analyzes the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

Justification for the use of nondeadly force requires a defendant to honestly and reasonably believe that use of force was necessary to protect him from harm. MCL 780.971 *et seq.* The degree of force used must be proportionate to the danger encountered. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). "Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt." *People v James*, 267 Mich App 675, 677; 705 NW2d 724 (2005) (citation omitted).

At trial defendant admitted to striking the victim with his fist. However, defendant contends that his altercation with the victim occurred only after he attempted to break up a physical confrontation between the victim and another individual and the victim directed aggressive physical behavior toward him. According to defendant the victim verbally threatened

him, forced him back against a building and threw a punch, which only grazed his face. It was only at this point that defendant asserts he struck the victim in an effort to remove himself from proximity to the victim.

Although defendant presented evidence of self-defense, clearly the jury rejected defendant's version of events. Credibility determinations are solely within the purview of the trier of fact. *Avant, supra* at 506. Evidence showed that several of the individuals involved in the altercation had been drinking, including the victim who had a blood alcohol level of .248 when receiving treatment for his injuries at the hospital. It was defendant and Ditrapani that came to the victim's residence trying to incite him to confront Knapp regarding inappropriate comments he had made pertaining to the victim's niece. Defendant acknowledged that the victim did not interact with him physically until defendant interjected himself into the confrontation between the victim, Knapp and Ditrapani. Even if the victim demonstrated aggressive behavior toward defendant by poking him in the chest and throwing a punch, defendant acknowledges that he was not significantly harmed and provides no justification for the use of a baseball bat to defend himself against the victim who was unarmed and highly intoxicated. "The evidence, when viewed in a light most favorable to the prosecution, was sufficient for the jury to find that defendant did not maintain an honest and reasonable belief that he was in imminent danger or that the victim posed a threat of serious bodily harm." *James, supra* at 678.

Finally, defendant contends that the trial court improperly scored Offense Variables (OV) 9 and (OV) 10 based on facts not proven to the jury. As a result, defendant argues that his sentence was improperly enhanced and constituted a violation of his constitutional rights as recognized in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Although we note that our Supreme Court, in *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), recognized that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, we review defendant's challenges to the propriety of the trial court's scoring of the contested variables.

Specifically, defendant challenges the scoring of 10 points on OV 9 for the presence to two victims during the assault. MCL 777.39(1)(c). Contrary to defendant's assertion, testimony was presented at trial that in addition to the primary victim's injuries, Knapp was also assaulted and showed physical signs of injury. Defendant testified that he observed Ditrapani strike Knapp with a shovel during the altercation. MCL 777.39(2)(a) provides for the inclusion of "each person who was placed in danger of injury or loss of life as a victim." Individuals involved in the criminal transaction may be counted as victims, *People v Chesebro*, 206 Mich App 468, 472-473; 522 NW2d 677 (1994), as well as bystanders and persons who intervene if they are placed in danger of injury, *People v Morson*, 471 Mich 248, 261-262; 685 NW2d 203 (2004). As such, sufficient evidence existed to support the trial court's scoring of this variable.

Defendant also asserts it was improper for the trial court to score 5 points for OV 10. MCL 777.40(1)(c) permits the imposition of this score when "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." The trial court specifically noted the victim's high level of intoxication when scoring this variable, particularly given defendant's assertion that he had consumed relatively small amounts of alcohol prior to the confrontation.

This Court will uphold a trial court's scoring of a sentencing guidelines variable if there exists any evidence to support it. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Affirmed.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Patrick M. Meter